IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.N.KRISHNAN

WEDNESDAY, THE 13TH JUNE 2007 / 23RD JYAISHTA 1929

WP(C).No. 18338 of 2006(G)

(O.S.NO: 459/05 OF SOUB COURT, ERNAKULAM)

PETITIONER:

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1. SEETHARAM,
   S/O.SUBHA RAO,AGED 48,8/101,T.D.EAST ROAD,
   MATTANCHERRY, KOCHI-2

2. MRS.UMA DEVI,
   W/O.MOHANDAS, AGED 43, 13/64,KKOPRAPARAMBIL,
   POONNURUNNIDESAM.

BY ADV. SRI.G.KRISHNAKUMAR

RESPONDENTS:

P.KRISHNA VADHYAR,
S/O.PURISHOTHAMA VADHYAR, AGED 55,
S.N.JUNCTION, NADAMA VILLAGE,TRIPPUNITHURA P.O.,
KOCHI-682301.

BY ADV. SRI.K.N.SIVASANKARAN

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 13/06/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

APPENDIX

PETITIONER'S EXTS:

EXT.P1: PHOTOCOPY OF THE PLAINT IN O.S.459/05 ON THE FILE OF SUB COURT, KOCHI

EXT.P2: -DO- OF THE WRITTEN STATEMENT FILED IN O.S.459/05 ON THE FILE OF -DO-

EXT.P3; -D0- OF I.A. 6213/06 IN O.S. 450/05 ON THE FILE OF -DO-

EXT.P4: -DO- OF THE COUNTER AFFIDAVIT IN I.A.6213/05 IN O.S.450/03

EXT.P5: -DO- OF THE ORDER DT. 7.3.06 IN I.A.6213/05 IN O.S.459/05 ON THE FILE OF SUB COURT, ERNAKULAM

EXT.P6: -DO- OF I.A.1492/06 IN I.A.6213/05 IN O.S. 459/05 ON THE FILE OF SUB COURT, ERNAKULAM

EXT.P7: -DO- OF THE ORDER DT.4.4.06 IN I.A.1492/06 IN I.A.6213/05 IN O.S.459/05 ON THE FILE OF -DO-

jj /TRUE COPY/

P.S.TO JUDGE

M.N. KRISHNAN, J.

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W.P.(C) No. 18338 OF 2006 G
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Dated this the 13th June, 2007

J U D G M E N T

This writ petition is filed seeking to quash Exts. P5 and P7 orders. Ext. P5 order is the one whereby the trial court appoints a commissioner to demarcate the plaint schedule property and Ext. P7 is an order dismissing the review application.

2. I have heard the counsel for both sides.

3. The property originally belonged to Eldo Poulose and the defendant had purchased the same by virtue of a document of the year 2002. It is alleged that subsequently he had entered into an agreement to sell the plaint schedule property consisting of 1/3rd portion of 32 cents of garden land in survey No. 243/1 in Ponnurunni Village to the plaintiff or his nominee as the case may be. Now the attempt of the plaintiff is to get that 1/3rd of the property demarcated. It has to be stated that here is a case where the defendant had denied the execution of the agreement and the terms of the agreement does not show or describe which portion of the property is to be assigned. So at the

most if the plaintiff succeeds he will be getting a right over the 1/3rd share of the property and it is well settled position that fractional share also can be assigned by virtue of decree of specific performance. So even if the plaintiff ultimately succeeds his remedy will be to file a suit for partition to get his 1/3rd share separated. So even if the suit is decreed the court cannot find out in a suit for specific performance which is the portion that is sought to be assigned admittedly in the absence of any mention about the area which is intended to be assigned. Therefore, the issuance of a commission is absolutely beyond the scope of the suit and therefore the orders under challenge, namely, Ext. P5 is set aside and the order Ext. P7 is disposed of holding that in the light of setting aside the order under Ext. P5 nothing survives for consideration under Ext. P7. The trial court is directed to proceed with the matter and dispose of it in accordance with law.

M.N. KRISHNAN
JUDGE

jan/